93-343

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STOCHASTIC DECISIONS, INC.,

Petitioner,

v.

JAMES DiDOMENICO; ANTHONY DiDOMENICO; CAROL DiDOMENICO; DCJM REALTY CORP.; CAROL COACHES, INC.; J.D. ENTERPRISES, INC.; SOUTHGATE BUS SERVICE; ARTHUR WAGNER; WAGNER, McNIFF & DiMAIO; AND KINGSBURY-PUTNEY, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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102 pp

QUESTION PRESENTED

Under the federal Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1961, *et seq.*) ("RICO") is a defendant who engages in a pattern of racketeering activity for the purpose of preventing the plaintiff from collecting a judgment debt liable for three times the amount of the judgment debt, less any amounts paid subsequent to the filing of the RICO action?

LIST OF PARTIES

Petitioner, Stochastic Decisions, Inc., was the plaintiff-appellant-cross-appellee in the proceedings below.[1/] Respondents James DiDomenico, Anthony DiDomenico, Carol DiDomenico, DCJM Realty Corp., Carol Coaches, Inc., J.D. Enterprises, Inc., Southgate Bus Service, Arthur Wagner, Wagner, McNiff & DiMaio, and Kingsbury-Putney, Inc., were the defendants-appellees-cross-appellants in the proceedings below.

Lucille Wagner, T. Gluck & Co., Inc., Geoffrey Ashby, Thomas Miral and Michael Berke were additional defendants in the proceedings below.

1/ Petitioner has no parent corporation or subsidiary corporations.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STOCHASTIC DECISIONS, INC.,
Petitioner,

v.

JAMES DiDOMENICO; ANTHONY DiDOMENICO; CAROL DiDOMENICO; DCJM REALTY CORP.; CAROL COACHES, INC.; J.D. ENTERPRISES, INC.; SOUTHGATE BUS SERVICE; ARTHUR WAGNER; WAGNER, McNIFF & DiMAIO; AND KINGSBURY-PUTNEY, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Stochastic Decisions, Inc. respectfully prays that a writ of *certiorari* issue to review that part of the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on June 4, 1993, which excluded from Petitioner's damages under 18 U.S.C. §1964(c) the amount of the judgment debt which was the subject of Petitioner's claim.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit has not yet been reported, and is reprinted in the Appendix hereto at page A-1, *infra*. The order of the United States Court of Appeals for the Second Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc*, dated August 19, 1993, is reprinted in the Appendix hereto at page B-1, *infra*.

The oral decision, the Final Judgment and Order and the Supplemental Final Judgment and Order of the United States District Court for the Eastern District of New York are unreported, and are reprinted in the Appendix hereto at pages C-1, D-1 and E-1, *infra*, respectively.

JURISDICTION

Petitioner brought this suit in the District Court, invoking jurisdiction under 18 U.S.C. §1964(c) and 28 U.S.C. §1331. On November 19, 1991 the District Court entered a Final Judgment and Order, and on February 27, 1992 the District Court entered a Supplemental Final Judgment and Order.

Petitioner appealed to the United States Court of Appeals for the Second Circuit from certain portions of the District Court's decision, invoking jurisdiction under 28 U.S.C. §1291. The Second Circuit affirmed the orders of the District Court on June 4, 1993. On June 18, 1993 Petitioner filed a timely Petition for Rehearing With a

Suggestion for Rehearing *En Banc*. The Second Circuit denied the Petition for Rehearing With a Suggestion for Rehearing *En Banc* on August 19, 1993.

Petitioner invokes the jurisdiction of this Court to review the Judgment and Order of the Second Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §§1961, 1962 and 1964 are reprinted in the Appendix hereto at page F-1, *infra*.

STATEMENT OF THE CASE

Petitioner brought this action against Respondents and other defendants to recover, *inter alia*, under the federal Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§1961, *et seq.*) ("RICO") for Respondents' fraudulent conspiracy to prevent Petitioner from collecting a legitimate state court judgment debt. (*See* p. D-8, *infra*)

The Underlying Judgments

On June 13, 1988 Petitioner obtained judgments against certain of the Respondents in the Superior Court of New Jersey in the total amount of $374,363.34 (the "First Judgment"). The First Judgment was affirmed by the New Jersey Appellate Division, and the defendants' petition for

certification to the New Jersey Supreme Court was denied. (*See* p. D-7, *infra*)

On April 10, 1989 Petitioner obtained another judgment against certain of the Respondents in the total amount of $493,488.76 (the "Second Judgment") At the time Petitioner's debts were incurred, Respondents had sufficient assets to satisfy those judgments, as well as the claims of their other creditors. Upon obtaining the judgments, Petitioner began supplemental proceedings to discover the defendants' assets and to collect the judgment debt. (*See* p. D-8, *infra*)

The RICO Conspiracy

In order to avoid paying their creditors, Respondents entered into a conspiracy masterminded by a New York lawyer, Arthur Wagner and his law firm, Wagner, McNiff & DiMaio to conceal the defendants' assets and to prevent Petitioner from collecting its legitimate debt. Respondents began the conspiracy to shield their assets during the mid-1980's, even before Petitioner obtained its judgments. (*See* pp. C-4, D-9, D-10, *infra*) In furtherance of this conspiracy, Respondents engaged in numerous acts of mail fraud and wire fraud involving the use of "dummy" corporations and fraudulent sales and mortgages, all for the purpose of concealing the defendants' assets and preventing Petitioner from collecting the underlying judgments. Prior to the institution of this action, Petitioner incurred legal fees and expenses of approximately $50,000 in uncovering Respondents' various fraudulent transfers and attempting -- unsuccessfully -- to collect the First Judgment and the Second Judgment. (*See* pp. D-10, D-11, *infra*)

The RICO Action

On January 31, 1989 Petitioner filed this action against Respondents (the "RICO Action"). At the time Petitioner filed the RICO Action Respondents had completely frustrated Petitioner's attempts to collect the First Judgment.[2/] Petitioner sought an award of actual damages under §1964(c) in the amount of $996,404 -- the underlying judgments and Petitioner's post-judgment legal fees -- to be trebled to $2,989,214.

On December 17, 1989 -- 11 months after it filed the RICO Action -- Petitioner obtained payment of the First Judgment by levying on a contract between one of the Respondents and the New York City Board of Education. To date, Petitioner has not recovered any payment on the Second Judgment. (*See* p. D-8, *infra*)

The RICO Action was tried to the District Court sitting without a jury. At the conclusion of the trial the District Court found that Respondents had engaged in a conspiracy in violation of 18 U.S.C. §§1962(c) and (d), which included scores of acts of wire fraud and mail fraud. The District Court found that all of the Respondents participated in the RICO conspiracy. The District Court further found that Petitioner had standing under RICO because it suffered injury through non-payment of the

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2/ The Second Judgment was entered approximately four months after Petitioner filed the RICO Action, but the judgment had been announced by the trial court after the completion of the trial in December 1988.

amounts owed to it and through Respondents' frustration of its attempts to obtain payment. (*See* p. D-13, *infra*) However, the District Court declined to include the amounts of the underlying judgments as damages which Petitioner could recover under §1964(c). Rather, the court held that Petitioner could recover as RICO damages only the attorneys' fees and costs which it incurred in uncovering Respondents' RICO violations and attempting to collect the prior judgments. The District Court therefore awarded Petitioner damages on the RICO claim in the amount of $50,000, which it trebled to $150,000. The court also awarded Petitioner attorneys' fees incurred in the RICO action, after making certain reductions, in the amount of $317,477, and therefore entered judgment on the RICO claim in the total amount of $467,477.

The Second Circuit Decision

Petitioner appealed the District Court's exclusion of the underlying judgments from the RICO damages to the United States Court of Appeals for the Second Circuit. Petitioner cited the Second Circuit's decision in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989), in which the Second Circuit held that a creditor who is prevented from collecting its debt by a pattern of racketeering activity can recover its "lost debt" under RICO. Petitioner also cited numerous cases which held that payment of a RICO plaintiff's actual damages after the filing of the RICO action does not extinguish the plaintiff's right to RICO treble damages, but rather is only an offset to the amount of the judgment after the plaintiff's actual damages have been trebled. The Second Circuit affirmed the District Court's decision.

The Second Circuit held that because the First Judgment had been satisfied subsequent to the filing of the RICO Action it could not constitute "lost debt" damages under RICO. The court further held that the amount of Petitioner's lost debt resulting from the Second Judgment was "unprovable" because Petitioner might ultimately be able to collect the judgment. The court held that if Petitioner "ultimately" failed to collect the Second Judgment, "it may then have a RICO claim as the basis of a separate action." (*See* p. A-17, *infra*) However, the court did not specify what further efforts to collect the judgment Petitioner would have to undertake in order to bring a second RICO action, or indicate what facts Petitioner could prove in the second RICO action that were not proven in the first.

The Second Circuit declined to apply the principle, recognized in the cases cited by Petitioner, that restitution made after the filing of the RICO action does not extinguish the plaintiff's RICO claim. The court found that rule to be inapplicable where the "central purpose" of the RICO violation was to prevent the collection of a legitimate debt. The court held that in such cases any ultimate collection of the debt at issue abates the RICO claim prior to trebling. (*See* p. A-18, *infra*)

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's exclusion of lost debt from the damages recoverable under RICO is inconsistent with this Court's broad interpretation of the statute and defeats the statute's remedial purpose in an era when financial institutions and other creditors have an especially urgent need to discourage fraudulent conduct by their customers.

When Congress enacted RICO, it expressly provided that the statute should be liberally construed to effectuate its remedial purpose. Pub. L. 91-452, §904(a), 84 Stat. 947. This Court has repeatedly recognized the need to interpret RICO broadly in order to achieve its purpose, and has rejected attempts to judicially re-write -- or limit the application of -- the statute. In *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479 (1985), this Court reversed a decision of the Second Circuit which imposed a requirement that a plaintiff prove a separate "racketeering injury" in order to recover under §1964(c). This Court rejected the Second Circuit's attempt to judicially limit the application of §1964(c), and wrote:

> This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is

> to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," . . . . The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity. . . . Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate §1964(c) from the statute.

473 U.S. at 497-498 (citations omitted).

As in *Sedima*, the Second Circuit's decision in the instant case is inconsistent with the purpose of RICO, and would effectively eviscerate §1964(c) as it applies to RICO violations intended to prevent collection of legitimate debts. Significantly, the Second Circuit recognized that such a lost debt can constitute an injury to business or property for which a plaintiff may recover under §1964(c). Yet, the court denied such damages to Petitioner. Relying on its decision in *Bankers Trust Company v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989), the court held that a RICO claim for lost debt does not accrue until it is "established" that collection of the claim or judgment has been "successfully frustrated." Essentially, the Second Circuit held that a defrauded creditor can utilize RICO as a remedy only where the debt is totally uncollectible.

In *Rhoades* the plaintiff, Bankers Trust, was a creditor in a chapter 11 bankruptcy case. Bankers Trust consented to the debtor's plan of reorganization, under which Bankers Trust received only 17.5% of its allowed claim. Neither the court nor the creditors were aware, however, that the debtor had fraudulently transferred substantial assets in order to exclude them from the bankruptcy estate from which the plan would be funded. When Bankers Trust discovered the transfer it moved in the bankruptcy court to revoke the confirmation of the debtor's plan, on the ground that it was procured by fraud. Bankers Trust also filed a complaint under RICO in which it sought to recover the amount of its claim as a lost debt. In denying recovery for the lost debt, the Second Circuit held that Bankers Trust's RICO claim overlapped the bankruptcy proceeding, because Bankers Trust was injured by the same acts which injured the bankrupt corporation, and because the bankruptcy trustee was seeking to recover the fraudulently transferred property on behalf of the estate. The court therefore held that Bankers Trust's lost debt had not yet been sufficiently determined to support a RICO claim.

Even if the *Rhoades* decision was correct based on the facts present there, it has no application to the instant case. It is difficult to imagine a case were frustration of collection is more clear than the present case. Here there was no pending bankruptcy proceeding in which the judgment debts were being pursued. Petitioner had spent five years trying to collect its judgment debt, and had proven that Respondents' RICO violations had prevented collection. Yet, the Second Circuit held that Petitioner's lost debt was still unproven.

The Second Circuit's decision thus creates a requirement that a creditor victimized by a RICO conspiracy designed to prevent collection of its debt must engage in five levels of litigation before it can recover lost debt damages under RICO.

First, the creditor must litigate to obtain a judgment on the underlying debt.

Second, the creditor must attempt to collect the judgment debt.

Third, when the judgment debtor engages in a pattern of racketeering activity which prevents collection of the judgment debt, the creditor must file a RICO action. If the creditor succeeds in proving a RICO violation, it will recover only the attorneys fees incurred in its previous collection efforts, which will be trebled, and some or all of the attorneys' fees incurred in the RICO action.

Fourth, the creditor must engage in further litigation -- of unspecified type and duration -- to collect the judgment debt.

Fifth, when the further efforts to collect the judgment debt fail, the creditor must institute a *second* RICO action.

Under the Second Circuit's reasoning, Petitioner's lost debt would *never* constitute a RICO injury so long as there existed a new fraudulent transferee against whom Petitioner could institute suit, since the debt would remain, theoretically at least, "collectible." This view has no basis in law. The requirement of virtually endless collection

efforts, like the requirement of a "racketeering injury" which the Second Circuit previously tried to impose, is inconsistent with the plain terms of RICO, which provide that a defendant who violates §1962 is liable for treble damages to any party who is injured thereby. *Sedima*, 473 U.S. at 497.

II.

The Second Circuit's decision is in conflict with the law in other circuits that payment of actual damages after the filing of the RICO action does not extinguish a RICO claim.

The Second Circuit denied Petitioner RICO damages for its lost debt on the ground that the First Judgment was satisfied *after* the RICO Action was filed, and -- in the court's view -- the Second Judgment would probably be satisfied eventually. Thus, the Second Circuit held that RICO damages are not available where the plaintiff recovers, or might recover, its actual damages after filing the RICO action. The Second Circuit's view would completely eviscerate §1964(c), and is in direct conflict with the decisions of other courts of appeals and district courts which have held that restitution paid to a RICO plaintiff after the filing of the complaint has no effect on the plaintiffs' right to a trebling of its proven actual damages, and is simply set off against the amount of treble damages awarded in the RICO action.

The Seventh Circuit directly addressed the effect of post-filing restitution on a RICO damage award in *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989). In *Liquid Air Corp.* the defendants had leased a large number of compressed gas cylinders from the plaintiff. At the conclusion of the lease term the defendant submitted fraudulent documents to the plaintiff which falsely represented that the defendant had returned the leased cylinders to the plaintiff. Upon discovering the defendant's fraud the plaintiff filed a RICO complaint. At the conclusion of the trial the jury entered judgment for the plaintiff on the RICO claim, and assessed actual damages for lost rent and the replacement value of the cylinders in the amount of $750,000 -- which would be trebled to $2.25 million. After the verdict was rendered the defendants returned a large number of the cylinders to the plaintiff. The defendants then argued that the replacement value of the returned cylinders should be set off against the actual damages assessed by the jury before those damages were trebled under §1964(c). Both the district court and the Seventh Circuit disagreed. Affirming the jury verdict and award of damages "in all respects," the Seventh Circuit wrote:

> While the return of the cylinders may compensate Liquid Air for the replacement value of the cylinders, it does not compensate it for rents lost prior to litigation. More importantly, it does not negate the frauds perpetrated by defendants. We conclude that setting-off damages *after* trebling is more likely to effectuate the purposes behind RICO.

834 F.2d at 1310 (emphasis in original).

The Seventh Circuit reached a similar conclusion in *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), where the court held that a municipality could recover under RICO for taxes lost due to the defendant assessor's RICO violations, even though the municipality had recovered the lost revenues by increasing the tax rate. 777 F.2d at 1176, *quoting United States v. Lynch*, 699 F.2d 839, 845 (7th Cir. 1985) ("There is no basis in the statute or case law for concluding that the victim of a fraud is not an aggrieved party simply because he obtains compensation from another source.").

The District of Columbia Circuit has also indicated that payment of restitution after the filing of a RICO complaint does not negate the plaintiff's right to recover RICO damages. *Pyramid Securities, Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114 1117 n.3 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 85 (1991) ("Under RICO it appears the proceeds of prior judgments are set-off against a recovery only after the trebling of damages.").

The Ninth Circuit reached the same conclusion in the context of a treble damage award under the antitrust statutes in *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).[3/] There, the

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[3/] Because the treble damage provision of §1964(c) is nearly identical to that contained in §4 of the Clayton Act, 15 U.S.C. §15, courts have often looked to antitrust cases for guidance in interpreting the treble damage provision of the RICO statute. *See*, (continued...)

court held that settlement payments made by co-defendants should be set-off only after trebling the actual damage award, and wrote:

> Irrespective of the nature of the cause of action, a plaintiff is entitled to one full satisfaction of his claim in an action against joint defendants. In the case at bar ... such satisfaction would not be achieved by the award of any sum, which added to the settlement sum, did not total [three times the actual damage award]. ... Any other method would have resulted in plaintiffs' receiving less than the whole to which they were entitled.

246 F.2d at 398.

The Second Circuit itself has applied the *Flintkote* rule in an antitrust case. In *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.*, 635 F.2d 118 (2d Cir. 1980), *aff'd on other grounds*, 456 U.S. 556 (1982), the Second Circuit detailed the reasons for applying settlement payments only *after* trebling a plaintiff's damage award:

[3/](...continued)

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 486-87 (1985) (noting that Congress modeled RICO's treble damages provision after the treble damages remedy in the antitrust laws); *Carter v. Berger*, 777 F.2d 1173, 1175-76 (7th Cir. 1985) ("[T]he damages provision in §1964(c) is practically verbatim the damages provision in the antitrust laws.").

> First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. ... Second, ... one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totalling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs; every dollar received in settlement would cause a three dollar reduction in the judgment at trial.

635 F.2d at 130.

Cf. Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 262-63 n.14 (1972) ("Under §4 [of the Clayton Act], courts will not go beyond the fact of the injury to determine whether the victim of the overcharge has partially recouped its loss in some other way....").

District courts in other circuits are in accord. In *Commonwealth of Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985), the defendant, a state senator, placed fictitious employees on the senate payroll. In 1977 $30,000 was wrongfully paid to these fictitious employees by the senate. In 1978 and 1979 the senate recovered the entire $30,000 by deducting that amount from the defendant's retirement payments. After the full amount had been repaid, the state filed a RICO action and recovered a treble damage award. The defendant argued

that the state's claim was barred under RICO because the actual debt had been repaid. The court rejected the argument, and wrote:

> [Defendant's] interpretation [of RICO trebling] would enable any person guilty of violating §1962 to avoid the imposition of treble damages by the simple device of making restitution before the injured person brings suit. To adopt such a restrictive reading of §1964(c) would contravene Congress' mandate that the RICO statute be construed liberally to effectuate its remedial purpose. P.L. 91-452 §904, *reprinted in* 18 U.S.C.A. following §1961.

600 F. Supp. at 1367. *See, also, In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation*, 636 F. Supp. 1138, 1152 (C.D. Cal. 1986)("[T]he 'full satisfaction' to which treble damage claimants are entitled is 'three times the proven actual damages' -- any award less than that amount constitutes an incomplete recovery.").

The Second Circuit's decision in this case departs from settled law in other circuits -- that a RICO plaintiff is entitled to recover three times its injury regardless of any post-complaint recovery from the defendant -- and undermines the Congressional purpose behind the treble damage provision of §1964(c). Under the Second Circuit's interpretation, a fraudulent debtor could avoid RICO liability simply by tendering payment of the underlying debt at any time before or after the trial of the RICO action. In fact, the debtor would not even have to tender payment, so long as the court believed that the plaintiff

may ultimately find some way to collect the underlying judgment.

The Second Circuit distinguished the cases which have rejected that view on the sole ground that they did not involve "a RICO violation whose central purpose was to prevent the collection of a lost debt." The court thus created a separate and distinct rule for cases where the RICO violation was designed to prevent collection of a legitimate debt. The court's distinction is not only analytically unsound, it is absolutely unsupported in the RICO statute or case law. The Second Circuit's decision permits fraudulent debtors to perpetrate a RICO violation with virtual impunity at least once. This judicial amendment of the statute, if allowed to stand, will have far reaching adverse consequences for financial institutions and other creditors.

CONCLUSION

The Second Circuit's decision is inconsistent with this Court's broad interpretation of RICO, and is in conflict with the settled law in other circuits. Further, the decision, if allowed to stand, would completely eviscerate the private cause of action established by §1964(c) for RICO violations intended to prevent the collection of legitimate debts. There is no basis in either the statute or in this Court's precedent for such a judicial limitation of RICO. Petitioner

therefore respectfully requests that its petition for a writ of *certiorari* be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 110, 111, 112 -- August Term, 1993
(Argued: September 21, 1992 Decided: June 4, 1993)

STOCHASTIC DECISIONS, INC.
Plaintiff-Appellant-Cross-Appellee,

- v. -

JAMES DiDOMENICO; ANTHONY DiDOMENICO; CAROL DiDOMENICO; DCJM REALTY CORP.; CAROL COACHES, INC., J.D. ENTERPRISES, INC.; SOUTHGATE BUS SERVICE; ARTHUR WAGNER; LUCILLE WAGNER; WAGNER, McNIFF & DiMAIO; T. GLUCK & CO., INC., and MICHAEL BERKE,
Defendants-Appellees-Cross-Appellants,

KINGSBURY-PUTNEY, INC.; GEOFFREY ASHBY; and THOMAS MIRAL,
Defendants.

Before: VAN GRAAFEILAND, WINTER, and MAHONEY,
Circuit Judges.

Plaintiff-appellant-cross-appellee appeals, and defendants-appellees-cross-appellants cross-appeal, from a final judgment entered November 19, 1991 and a supplemental final judgment entered February 27, 1992 in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*. The district court awarded judgment to plaintiff-appellant-cross-appellee on its civil RICO, fraudulent conveyance, and common law fraud claims against certain of the defendants-appellees-cross-appellants, but determined that plaintiff-appellant-cross-appellee was not entitled to treble certain damages or recover a portion of claimed attorney fees, and dismissed the claims of plaintiff-appellant-cross-appellee against certain defendants.

We affirm.

HELEN DAVIS CHAITMAN, New York, New York (Jody B. Keltz, Georgia McMillen, Scott Turner, Ross & Hardies, New York, New York, of counsel), *for Plaintiff-Appellant-Cross-Appellee.*

MICHAEL R. PERLE, Weehawken, New Jersey (Barry A. Tessler, New York, New York, Hayden, Perle & Silber, Weehawken, New Jersey, of counsel), *for Defendants-Appellees-Cross*

Appellants Arthur Wagner, Lucille Wagner, Wagner, McNiff & DiMaio, T. Gluck & Co., Inc., and Michael Berke.

Ronald G. Russo, New York, New York, *for Defendants-Appellees-Cross-Appellants James DiDomenico, Anthony DiDomenico, Carol DiDomenico, DCJM Realty Corp., Carol Coaches, Inc., J. D. Enterprises, Inc., and Southgate Bus Service.*

MAHONEY, *Circuit Judge*:

Plaintiff-appellant-cross-appellee Stochastic Decisions, Inc. ("Stochastic") appeals from a final judgment entered November 19, 1991, an order for turnover of funds and securities and other relief entered January 28, 1992, and a supplemental final judgment entered February 27, 1992 in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*. The final judgment found defendants-appellees-cross-appellants James DiDomenico ("James"), Anthony DiDomenico ("Anthony"), Carol DiDomenico ("Carol"), DCJM Realty Corp. ("DCJM"), Carol Coaches, Inc. ("Carol Coaches"), J.D. Enterprises, Inc. ("JD Enterprises"), Southgate Bus Service ("Southgate"), Arthur Wagner ("Wagner"), and Wagner, McNiff & DiMaio ("Wagner McNiff"), and defendant Kingsbury-Putney, Inc.

("Kingsbury")[1/] liable to Stochastic on its claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 (1988) *et seq.*, and on its state law fraudulent conveyance and common law fraud claims. The district court dismissed plaintiff's complaint against defendants Geoffrey Ashby and Thomas Miral with the consent of Stochastic. The supplemental final judgment accordingly dismissed the complaint with prejudice against them, and also against defendants-appellees-cross-appellants Lucille Wagner, T. Gluck & Co., Inc. ("Gluck"), and Michael Berke, whom the court found not liable on Stochastic's claims. Stochastic contends that the district court erred in its allowance of damages and attorney fees, and in its dismissal as to Lucille Wagner, Berke, and Gluck.[2/]

Defendants-appellees-cross-appellants ("Cross-Appellants") cross-appeal, contesting the district court's

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1/ A notice of appeal was filed by Kingsbury, No. 92-7385, but that appeal was subsequently defaulted and dismissed.

2/ Stochastic also contends on appeal that the district court should have held Thomas DiMaio liable as a RICO conspirator on the basis of alleged membership in Wagner McNiff, asserted to be a law partnership. DiMaio was not named individually as a defendant.

determinations as to liability, damages, and attorneys fees.[3/]

We affirm the final judgment and supplemental final judgment of the district court.

BACKGROUND

From 1982 through June 1985, Stochastic provided insurance brokerage services to all of the corporations owned by Anthony (husband) and Carl (wife) that were in the interstate bus transportation business. Stochastic also purchased two buses that it leased to anthony and Carol's former operating company, Eagle Bus, Inc. ("Eagle").

In 1984, Anthony and Carol and their corporations fell behind in their payment of insurance premiums to Stochastic. In order to pay Stochastic and other creditors, Anthony indicated that he and Carol would sell some of

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3/ It is unclear why a cross-appeal was filed on behalf of Lucille Wagner, Gluck, and Berke, since the district court dismissed the complaint against them with prejudice. No brief was filed or oral argument made on this appeal in behalf of the DiDomenicos and their related companies (DCJM, Carol Coaches, JD Enterprises, and Southgate), who filed a letter joining in those arguments of their fellow Cross-Appellants which were not inconsistent with the interests of the DiDomenicos.

their real estate. In the fall of 1984, the DiDomenicos retained Wagner and his law firm, Wagner McNiff, to represent them in various actions brought against them as guarantors of obligations of Eagle.

In October 1985, allegedly unbeknownst to Wagner, Eagle filed for reorganization under Chapter 11. At the time, Eagle owed approximately $2.3 million in secured claims, and Stochastic was listed as an unsecured creditor having a $165,000 claim. Stochastic asserts that Anthony and Carol filed misleading reports during the bankruptcy, fraudulently transferred Eagle's assets to Carol Coaches and others, and paid their personal living expenses under the guise of "officer's loans." A garage in Staten Island (the "Garage") was one of the assets allegedly transferred from Eagle to Carol Coaches without disclosure to the bankruptcy court and without consideration.

Ultimately, the bankruptcy petition was dismissed when Eagle failed to file financial reports. No Eagle creditors were ever paid. Stochastic alleges that Anthony and Carol continued to have their living expenses paid by Carol Coaches and thereafter by Southgate, Anthony and Carol's current bus operating company, formed by Wagner McNiff after Stochastic obtained a judgment against Carol Coaches.

Following the bankruptcy of Eagle, Anthony and Carol arranged for Wagner and Wagner McNiff to take control of essentially all of their assets and much of what were, at least on their face, the assets of James (son of Anthony and Carol), to whom Anthony and Carol were then transferring most of their own assets. The district court found that Wagner thereafter used these assets, which

were adequate to pay all of the debts of the DiDomenicos and their companies, to settle some of those debts, to pay personal expenses of Anthony and Carol and business expenses of James, to pay fees to Wagner and Wagner McNiff, and to pay Wagner's personal family expenses.

On January 10, 1986, Stochastic instituted a suit in New Jersey Superior Court to recover unpaid insurance premiums against James, Carol Coaches, DCJM, and two other bus companies operated by Anthony and Carl. *Stochastic Decisions, Inc. v. James DiDomenico*, No. L-009868-86 (N.J. Super. Ct. Law Div.) (the "*Insurance Case*"). Stochastic alleged that James was authorized to sign checks on behalf of Eagle, and had issued several Eagle checks to Stochastic in payment of insurance premiums for the corporate defendants that were returned for insufficient funds, or on which James stopped payment. Stochastic further alleged that James' fraudulent acts deprived him of the protection of the corporate veil under New Jersey law.

On June 13, 1988, judgment was entered in favor of Stochastic. The court held that: (1) the corporate defendants were liable for $175,564 in compensatory damages and $46,584.92 in prejudgment interest; and (2) James was personally liable for $41,265 of the compensatory damages plus $10,949.42 of prejudgment interest, and $100,000 in punitive damages. The court indicated that it would consider rescinding the punitive damages award if Stochastic received payment of the balance of the judgment.

On October 31, 1988, Stochastic moved in New York Supreme Court, Richmond County for the

appointment of a receiver for James, Carol Coaches, and DCJM, contending that James and the corporations had been determined by the New Jersey court to have fraudulently transferred assets. On December 6, 1988, a receiver was appointed, and ascertained that $150,000 would be available by the end of that month for payment of the *Insurance Case* judgment as a result of Stochastic's levy upon a contract between the New York City Board of Education and one of the *Insurance Case* defendants.

The *Insurance Case* judgment was ultimately affirmed by the Appellate Division of the Superior Court, and certification was denied by the New Jersey Supreme Court. No. A-5827-87T1 (N.J. Super. Ct. App. Div. Oct. 30, 1989), *certification denied*, No. C-502 (N.J. Jan. 25, 1990). Stochastic eventually recovered the full amount of the judgment subsequent to the filing of the instant action.

Stochastic also filed suit on January 10, 1986 in New Jersey Superior Court against Anthony and Carol as guarantors of Eagle's obligations under the bus lease with Stochastic. *Stochastic Decisions, Inc. v. Anthony DiDomenico*, No. L-010054-86 (N.J. Super. Ct. Law Div.) (the "*Guarantee Case*"). On April 10, 1989, Stochastic obtained a judgment in the amount of $474,150.38. On September 7, 1989, Stochastic was awarded an additional judgment of $19,338.38 for legal fees and expenses incurred in the *Guarantee Case*. No appeal has been taken from these judgments. Stochastic apparently has not filed these judgments in New York, and they remain unpaid.

In 1986, Wagner proposed to Anthony and Carol that the Garage be sold, and allegedly developed a plan to

conceal the proceeds of the sale from Eagle's creditors. In December 1984, the Garage had been used by Anthony and Carol to secure a $499,000 loan to Eagle from Gateway State Bank ("Gateway"). In addition, Anthony and Carol personally guaranteed the loan, and pledged fifteen acres of land in Staten Island (the "Vacant Land") and their Bayonne residence (the "Residence") as collateral. The loan closing was handled by DiMaio, an employee of, and alleged partner in, Wagner McNiff. *See supra* note 2.

The Garage was sold for $2.1 million in May 1987. The Gateway mortgage was satisfied from the proceeds of this sale, but Wagner arranged for the mortgage to be assigned by Gateway to Wagner's son-in-law, Berke, as a continuing encumbrance upon the Vacant Land and the Residence.

Wagner, on behalf of Berke, then proceeded with a foreclosure action against the Residence that had initially been instituted by Gateway prior to the full satisfaction of its mortgage. *Berke v. Anthony DiDomenico*, No. F-5186-88 (N.J. Super. Ct. Ch. Div.) (the "*Foreclosure Case*"); *see also Gateway State Bank v. DCJM Realty Corp.*, No. F-6628-86 (N.J. Super. Ct. Ch. Div.) (original foreclosure action by Gateway). The complaint in the *Foreclosure Case* was amended on December 28, 1988 to name Stochastic as a defendant, but the amended complaint was not served upon Stochastic until February 14, 1989.

After a question arose in the foreclosure proceedings whether Berke had paid consideration for the assignment of the mortgage on the Residence, Berke's counsel wrote a letter to the court dated December 11, 1987 that enclosed a check from Berke to Wagner McNiff

dated December 10, 1987 in the amount of $249,139.48 as evidence of such payment. Wagner subsequently admitted in testimony at the trial of the instant case, however, that "the 247 or 249 was never actually put up by [Berke]. It was put up by money that we advanced to him out of the Carol Coaches mortgage for the purpose of attempting to insulate the elder DiDomenico's family home in Bayonne, New Jersey." This testimony is confirmed by documentary evidence of a $250,000 wire transfer to Berke on December 7, 1987.

The New Jersey chancery court ultimately determined that there was "a very neat, contrived, controlled plan of both Wagner and [Berke]" designed "for the purpose of causing a fraudulent conveyance [to] insulate[e] a judgment [debtor] from . . . creditors," and granted summary judgment against Berke in the foreclosure proceeding on October 31, 1990.

On June 6, 1988, just prior to the entry of judgment in the *Insurance Case*, James, upon Wagner's instructions, executed a deed on behalf of DCJM that transferred the Vacant Land to Kingsbury for nominal cash and an assumption of existing obligations. Kingsbury was a shell corporation recently formed for this purpose whose nominal shareholder was a Wagner McNiff client. Wagner testified in the instant action that the transfer was intended "to safeguard the property" against seizure for execution of the forthcoming judgment in the *Insurance Case*.

After transferring the Vacant Land, Wagner solicited $350,000 from clients, the principals of Gluck, for an unspecified investment, which took the form of a loan to Wagner in that amount. The $350,000 check was made

out to Paradise Properties, an entity controlled by Wagner. After the loan was made, Wagner had Kingsbury execute a $425,000 mortgage on the Vacant Land to Gluck. Wagner testified at this action that the purpose of the mortgage was "to put another step between the property and Stochastic." Gluck apparently never requested a mortgage, and remained unaware of the mortgage until shortly before a principal of Gluck was deposed in the instant case.

On January 31, 1989, Stochastic filed the instant action in the United States District Court for the Eastern District of New York, alleging that the defendants engaged in a civil RICO conspiracy involving bankruptcy fraud, wire fraud, and mail fraud to prevent Stochastic from collecting the amounts it was owed. The complaint also alleged that the property transfers effected in the course of the conspiracy were fraudulent conveyances under applicable state law, and that the overall scheme constituted common law fraud.

After a twelve-day bench trial, the district court awarded judgment to Stochastic on all its claims against most of the defendants. *See supra* text accompanying note 1. The court found that Wagner and Wagner McNiff developed a plan to block Stochastic's attempts to collect on its judgments, and in the execution of that plan "used dummy corporations, dummy sales and mortgages, trust and special accounts of [Wagner McNiff], and nominees who had no understanding of how they were being used, including Wagner's son-in-law, some of his country club friends, and clients." The court further found that the resulting conspiracy continued over a period of five years,

and "included the commission of scores of wire frauds and scores of mail frauds."

The court stated that "[p]articular attention was devoted by the coconspirators to protecting the Vacant Land so that Wagner and [Wagner McNiff] could ultimately profit from its sale," and that Wagner's intention in that regard was to "cheat[] the elder DiDomenicos out of their last substantial asset" for his own personal benefit. The court also found that DiMaio individually was not responsible for any of the RICO predicate acts, and that Wagner McNiff "was not a bona fide partnership although it held itself out to the public as a general partnership." *See supra* note 2.

The court awarded Stochastic: (i) $467,477.24 on its civil RICO claim; (ii) $689,930.70 on its claim for violations of New York State fraudulent conveyance law; and (iii) $589,930.70 on its claim of common law fraud. The court further ruled that the first and second claims, totalling $1,157,407.94 could be independently recovered; that the second and third claims, on the other hand, could not be independently recovered, but were mutually exclusive; but that if judgment on the second claim was reversed, Stochastic could recover on the third. Ancillary equitable relief was also granted to effectuate collection of the monetary awards.

With respect to the civil RICO award, the court designated as RICO damages $50,000 in legal fees expended by the plaintiff in attempting to collect its New Jersey judgments. $71,976.26 was originally billed "for this phase of legal services," of which the court determined $5,100 was not properly related RICO damages and

$16,876.26 was excessive. In accordance with 18 U.S.C. § 1964(c) (1988), the resulting $50,000 amount was trebled because it was deemed "damages attributable and foreseeable [by] the conspirators, result[ing] directly from the RICO violations."

The court also awarded the plaintiff $317,477.24 in RICO attorney fees and expenses pursuant to § 1964(c), calculated as follows. Stochastic's counsel billed $497,477.24 for pursuing the instant case. The court subtracted $80,000 which was deemed "unreasonably excessive litigation," and the resulting amount was determined to be "an entirely reasonable sum given the difficulty of this kind of litigation." Of the remaining sum, $100,000 was allocated to fees and expenses involved in pursuing the fraudulent conveyance claim.

The $689,930.70 award on the fraudulent conveyance claim represented the amount due on the outstanding *Guarantee Case* judgment with applicable interest, plus $100,000 in legal fees. Finally, in the event that the fraudulent conveyance awarded was reversed, the district court awarded Stochastic $589,930.70 on its claim for common law fraud, but specified that attorney fees were unavailable on this claim.

This appeal, and the related cross-appeals, followed.

DISCUSSION

Stochastic contends on appeal that the district court erred: (1) in not trebling Stochastic's entire damage claim

(i.e., the amount owed to Stochastic by the defendants on January 31, 1989 when Stochastic commenced this lawsuit, assertedly $924,428.66, the legal fee incurred in obtaining the New Jersey judgment, and the unreduced legal fees of $71,976.26 billed in connection with collection of the New Jersey judgments); (2) by wrongly disallowing $180,000 of Stochastic's claimed legal fees in ascertaining the RICO attorney fee recoverable pursuant to § 1964(c); and (3) in finding Lucille Wagner, DiMaio, Gluck, and Berke not liable to Stochastic as RICO conspirators. Cross-Appellants counter all these arguments, and on cross-appeal maintain that: (1) the district court erred (a) in determining that any of the legal fees expended by Stochastic in collecting its New Jersey judgments constituted RICO damages, and (b) by awarding an excessive attorney fee to Stochastic on its RICO claim; (2) New Jersey's "entire controversy" doctrine bars Stochastic from asserting any of its claims in the instant action; and (3) Wagner was improperly held liable under the fraudulent conveyance and fraud counts for the amount of the *Guarantee Case* judgment. We proceed to the consideration of all these issues.

A. *RICO DAMAGES*.

Section 1964(c) provides that: "Any person injured in his business or property by reason of a [RICO] violation . . . shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." The district court determined that Stochastic was not entitled to the amounts owed on the *Insurance Case* or *Guarantee Case* judgments or the respective attorney fees in litigating those complaints as

part of its RICO damages. The district court held, however, that the attorney fees expended in pursuing collection of the judgments constituted RICO damages and were subject to trebling. On appeal, Stochastic contends that the district court erred by not trebling the amount that remained uncollected on amounts owed to it by Cross-Appellants at the time it instituted this lawsuit, as well as the attorney fees expended in obtaining the New Jersey judgments and in postjudgment collection efforts. Cross-appellants contend that attorney fees were improperly considered RICO damages.

1. *"LOST DEBT" DAMAGES.*

Stochastic premises its claim on entitlement to a trebling of the amount owed it by Cross-Appellants when it instituted this lawsuit principally upon our decision in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). In that case, Bankers Trust had consented, as a creditor, to a debtor's reorganization plan under which Bankers Trust received only 17.5% of its allowed claim. *Id.* at 1098. Neither the court nor the creditors, however, were aware that the debtor had fraudulently conveyed ownership of a corporation with net assets in excess of $3 million. *Id.* Bankers Trust subsequently claimed RICO injury for, *inter alia*, its "loss of legitimate debt . . . when, relying on defendants' misrepresentations, it accepted [the] bankruptcy reorganization plan . . . ." *Id.* at 1105. We held that the damages were "'unrecoverable,' at least at [the time of the litigation], because 'their accrual is speculative' and 'their amount and nature unprovable'" in light of the ongoing proceeding in the bankruptcy court to remedy the

fraudulent conveyance. *Id.* at 1106 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)).

Stochastic asserts that in accordance with *Bankers Trust*, because the Eagle bankruptcy was terminated without any payment to creditors and the amount of Stochastic's "lost debt" was definitively determined by entry of the New Jersey judgments, that amount should have been considered part of Stochastic's RICO injury. We disagree. The amount of the lost debt in the instant case, as in *Bankers Trust*, remains unprovable. In *Bankers Trust*, the amount of the bank's claim was definite, but the amount of its "lost debt" was nonetheless held to be indeterminate because of the ongoing bankruptcy proceedings. Similarly, although Stochastic has obtained judgments for specific amounts, the amount of its "lost debt" cannot be determined at this time because of the ongoing efforts to collect those judgments. As *Bankers Trust* recognized, a debt is "lost" and thereby becomes a basis for RICO trebling only if the debt (1) cannot be collected (2) "by reason of" a RICO violation. *See* § 1964(c).

As stated earlier, the full amount of the judgment in the *Insurance Case* has now been paid to Stochastic. Nor can the judgment in the *Guarantee Case*, obtained after the initiation of the instant action, be regarded as "lost debt." The district court has provided equitable relief in this case both *pendente lite* and in the final judgment to assure payment of the judgment in favor of Stochastic, which

includes the full amount of the judgment in the *Guarantee Case*. It accordingly appears that Stochastic's judgment in the *Guarantee Case* is likely to be fully satisfied, and the judgment cannot be regarded at this time as "lost debt." In the event, however, that Stochastic should ultimately fail to collect the judgment in the *Guarantee Case*, it may then have a RICO claim as the basis for a separate action. *See Bankers Trust*, 859 F.2d at 1106.

Stochastic asserts that permitting a defendant to avoid treble damages by paying compensatory damages prior to entry of the judgment vitiates the remedial nature of RICO. Stochastic cites several RICO and antitrust cases in support of this claim. *See Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114 (D.C. Cir.) (RICO action), *cert. denied*, 112 S. Ct. 85 (1991); *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.) (antitrust action), *cert. denied*, 355 U.S. 835 (1957); *In Re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 636 F. Supp. 1138 (C.D. Cal. 1986) (RICO action); *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985) (RICO action); *see also Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987) (RICO action), *cert. denied*, 492 U.S. 917 (1989).

We do not find these cases persuasive on the facts presented here. *Pyramid* stated, in the course of affirming a summary judgment dismissal of a RICO claim, a one-sentence footnote dictum, citing *Liquid Air*, that under RICO it "appears" that the proceeds of prior judgments are to be set off against a recovery only after the damages are trebled. 924 F.2d at 1117 n.3. *Liquid Air* involved an effort to return fraudulently converted gas cylinders *after*

the entry of a RICO judgment that trebled the damages resulting from that conversion. 834 F.2d at 1310.

In *Flintkote*, third parties made a pretrial settlement with the plaintiff that was allowed to offset the subsequent antitrust judgment against the defendant only after trebling. 246 F.2d at 397-98. *National Mortgage* applied this antitrust rule in the RICO context against a defendant who sought the benefit of another party's pretrial settlement. 630 F. Supp. at 1151. *Cianfrani* involved a withholding from retirement funds payable to a retired legislator of amounts equal to funds that he had embezzled by placing fictitious employees on the legislative payroll; the withholding was held not to bar a subsequent RICO award of treble damages (reduced by the prior withholding) in behalf of the state against the legislator. 600 F. Supp. at 1367.

None of these cases involved, as did *Bankers Trust*, a RICO violation whose central purpose was to prevent the collection of a claim or judgment. Accordingly, they do not provide reliable guidance for the resolution of the "lost debt" issue presented by this appeal. *Bankers Trust* makes clear that such a RICO claim does not accrue until it is established that collection of the claim or judgment has been successfully frustrated. In other words, to the extent of a successful collection, the RICO claim is abated *pro tanto*, prior to any application of trebling.

2. *ATTORNEY FEES AS RICO DAMAGES*.

Stochastic contends that *Bankers Trust* "makes it clear that plaintiff is . . . entitled to recover as [trebled]

RICO damages the . . . legal fees which plaintiff incurred in obtaining the two New Jersey judgments . . . [*Bankers Trust*, 859 F.2d at 1105.]" We disagree. Stochastic's argument would be equivalent to a ruling in *Bankers Trust* that the attorney fees incurred by the bank during the debtor's initial bankruptcy proceedings constituted RICO injury. However, Bankers Trust sought only past legal fees incurred in (1) fighting the debtor's frivolous satellite lawsuits; (2) overcoming bribe-induced decisions in South Carolina; and (3) obtaining a revocation of the initial reorganization plan. 859 F.2d at 1105. We allowed recovery of such fees, to the extent not barred by the statute of limitations. *Id.*

This ruling provides no basis to allow Stochastic to recover the legal fees initially expended in obtaining the New Jersey judgments. The asserted RICO violations in this case are defendants' illegal actions in impeding Stochastic's collection of those judgments. The Supreme Court has made it clear that a RICO injury must stem from and be proximately caused by a RICO violation. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) ("plaintiff . . . can only recover to the extent that . . . he has been injured in his business or property *by the conduct constituting the violation*" (emphasis added)); *see also Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1318-21 (1992) (articulating proximate cause requirement for RICO). In the instant case, it cannot plausibly be contended that efforts to impede the *collection* of the New Jersey judgments proximately caused Stochastic's prior expenditure of legal fees in *obtaining* the judgments. Additionally, we perceive no abuse of discretion by the district court in reducing the legal fees

claimed by Stochastic to have been spent in its collection efforts from $71,976.26 to $50,000.

Cross-Appellants contest the district court's allowance of that $50,000 (trebled to $150,000) as RICO damages. Relying primarily upon *Capasso v. Cigna Ins. Co.*, 765 F. Supp. 839, 842-43 (S.D.N.Y. 1991), they argue that the attorney fees cannot be RICO damages because they were only incidental and indirect consequences of any RICO violations in this case. The most pertinent language from *Capasso* is the following:

> The defendants point out that attorneys' fees and costs of investigation incurred as a result of defendants' allegedly illegal acts do not qualify as RICO injuries. *See, e.g., Local 335, Hotel, Motel, etc. v. Pier 66 Co.*, 599 F. Supp. 761, 765 (S.D. Fla. 1984); *Rylewicz v. Beaton Services, Ltd.*, 698 F. Supp. 1391, 1395-6 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989).
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> Here, it cannot reasonably be suggested that the harm contemplated by the alleged fraudulent scheme was an increase in [plaintiff's] attorneys' fees.

765 F. Supp. at 842.

The district court in *Capasso* immediately proceeded to point out, however, that no predicate RICO act of mail or wire fraud had been established, and to cite cases in

which litigation expenses in a prior litigation were allowed as RICO damages when a RICO violation was proved. *Id.* at 842-43. Further, as discussed *supra* herein, we explicitly ruled in *Bankers Trust* that legal fees may constitute RICO damages when they are proximately caused by a RICO violation. *See Bankers Trust*, 859 F.2d at 1105. We accordingly reject Cross-Appellants' contention that the district court improperly allowed the $50,000 legal fees expended by Stochastic in collecting the New Jersey judgments as (trebled) RICO damages.

B. *THE DETERMINATION OF STOCHASTIC'S § 1964(C) ATTORNEY FEE.*

Section 1964(c) mandates the recovery of "threefold the damages" sustained as a result of a RICO violation; Stochastic was awarded $150,000 for the (trebled) fees expended in collecting the New Jersey judgment pursuant to this provision. Section 1964(c) also requires a RICO plaintiff to be awarded "the cost of the [RICO] suit, including a reasonable attorney's fee." As described *supra*, Stochastic claimed an attorney's fee of $497,477.24. The district court disallowed $80,000 for "unreasonably excessive litigation," allocated $100,000 to Stochastic's pursuit of its state law claims, and awarded a fee of $317,477.24.

Stochastic contends that the district court erred in disallowing $80,000 of its legal fees.[4/] Cross-Appellants

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[4/] $100,000 of Stochastic's claimed RICO legal fee was allocated to the fraudulent (continued...)

maintain, on the other hand, that the district court "fail[ed] to recognize that . . . it . . . had discretion . . . to reduce the RICO fee award more drastically."

The district court's determination of the amount of attorney fees will be reversed only if the court abused its discretion. *Pierce v. Underwood*, 487 U.S. 552, 571 (1988); *Cassuto v. Commissioner*, 936 F.2d 736, 740 (2d Cir. 1991). Judge Weinstein presided over the twelve-day trial of this case and the related proceedings, and thus was in a superior position to determine the reasonableness of attorney fees. He explicitly disallowed those fees that he found to result from "unreasonably excessive" litigation, and granted only fees that were deemed an "entirely reasonable sum given the difficulty of this kind of litigation." Furthermore, he appropriately determined the portion of Stochastic's fees that was not related to the RICO claim, but rather was allocable to litigating the state law claims. *See supra* note 4.

Stochastic's argument consists of blanket assertions that these determinations "were not based on any evidence whatsoever," and that it is entitled to "its full legal fees in this action." These claims are insufficient to disturb the district court's conclusion that the amount it awarded

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[4/](...continued)

conveyance claim, but recovery of that $100,000 was allowed pursuant to N.Y. Debt. & Cred. Law § 276-a (McKinney 1990). The allocation thus did not harm Stochastic.

constituted a "reasonable attorney's fee" within the meaning of § 1964(c).

Cross-Appellants contend that the district court did not make an adequate determination of reasonableness, as required by *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See also Farrar v. Hobby*, 113 S. Ct. 566, 574 (1992) ("'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained'") (quoting *Hensley*, 461 U.S. at 436). Specifically, they assert that the court made only a "cursory lodestar calculation," and did not "complete the process by evaluating the reasonableness of the fees in comparison to the 'results obtained.'" On the contrary, the district court properly concluded that Stochastic had prevailed in proving its RICO claim against many of the defendants.

Further, both *Hensley* and *Farrar* construed 42 U.S.C. § 1988, which provides that in certain civil rights actions, "the court, in its discretion, *may allow* the prevailing party . . . a reasonable attorney's fee . . . ." 42 U.S.C.A. § 1988(b) (West Supp. 1992) (emphasis added). We noted in *United States Football League v. National Football League*, 887 F.2d 408, 412 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), that *Hensley* analysis "is of limited applicability" to statutes that mandate an award of attorney fees. *United States Football League* construed the fee provision of the Clayton Act, 15 U.S.C. § 15(a) (1988), which is virtually identical to the mandatory fee provision of § 1964(c). *See also Holmes*, 112 S. Ct. at 1317 ("Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act [15 U.S.C. § 15 (1988)] . . . .").

We accordingly affirm the district court's allowance of a $317,477.24 attorney fee to Stochastic.

B. *DISMISSAL AGAINST LUCILLE WAGNER, DIMAIO, GLUCK AND BERKE.*

The district court ruled that Lucille Wagner, DiMaio, Gluck, and Berke were not liable to Stochastic. On appeal, Stochastic contends that all these parties should have been held to be liable to Stochastic as RICO conspirators.

1. *LUCILLE WAGNER.*

Stochastic's amended complaint alleges no facts that implicate Lucille Wagner as a participant in the RICO violations. The complaint only identifies her as Arthur Wagner's wife, and then encompasses her in a general charge that "[a]ll of the defendants, directed by Wagner," engaged in RICO violations.

"[T]he bare minimum of a RICO charge is that a defendant personally committed or aided and abetted the commission of two predicate acts." *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989); *Sedima*, 473 U.S. at 496 n.14). The evidence adduced at trial concerning Lucille Wagner was inconclusive at best. There was proof that she was paid a $15,000 annual wage by Wagner McNiff during 1986 and 1987, but she denied ever working for the firm. Additionally, during 1987 and 1988, a number of checks from Paradise Properties, an entity that was a vehicle for

the receipt of fraudulent transfers in pursuance of the RICO scheme, were made payable to Lucille Wagner, but she denied ever receiving any money from Paradise Properties. The district court was certainly free to consider this proof to be inadequate to establish liability of Lucille Wagner to Stochastic.

2. *DIMAIO*.

Stochastic also argues that the district court erred in not holding DiMaio liable as a RICO conspirator. This argument is irrelevant, because DiMaio was not named as a defendant. *See supra* note 2. The alleged partnership, Wagner McNiff, was named as a defendant, however, and judgment was entered against the partnership. Accordingly, all of the assets of the partnership, but none of DiMaio's nonpartnership assets, are subject to the judgment. *See* N.Y. Civ. Prac. L. & R. 5201(b) cmt. 5201:17 (McKinney 1978).

If DiMaio advanced personal funds to the partnership, some issue as to the amenability of those funds to the judgment in this action might conceivably turn on whether they constituted a capital account of a partner or some other form of advance. In any event, no such issue is presented on this appeal.

We add that in our view, contrary to the conclusion of the district court, DiMaio was a partner in the law firm. DiMaio and Wagner worked under the firm name Wagner, McNiff & DiMaio for over thirty years. They shared office space, a secretary, a letterhead indicating that the firm was a partnership, and three bank accounts under the

name Wagner, McNiff & DiMaio. Both lawyers signed a partnership certificate for Marine Midland Bank when they opened one of the accounts which stated that they were general partners of the firm, and that "each general partner has full authority to represent and sign for the firm in all respects." Both Wagner and DiMaio were listed as members of the firm in Martindale-Hubbell. Further, they assisted each other in performing work for clients brought in by the other when needed, as in the case of the DiDomenicos. When DiMaio did work for Wagner's clients, they would frequently work out some type of revenue-sharing arrangement.

Stochastic also asserts that DiMaio is liable to Stochastic as a partner by estoppel in accordance with section 27 of the Uniform Partnership Act as enacted in New York. *See* N.Y. Partnership Law § 27 (McKinney 1988). This argument is specious. The statute provides that a person who is deemed a partner by estoppel "is liable to any such person to whom [a representation of partner status] has been made, *who has, on the faith of such representation, given credit* to the actual or apparent partnership. . . ." *Id.* § 27(1) (emphasis added). Stochastic only claims that DiMaio made such representations throughout the existence of the alleged conspiracy. Whether or not this is so, Stochastic does not even assert the further statutory predicate for relief, to wit, that Stochastic gave "credit" to Wagner McNiff on the basis of such representations.

3. *GLUCK*.

Stochastic also claims that the district court should not have dismissed the RICO complaint against Gluck. Only the most tenuous claims are advanced concerning Gluck's involvement in the transactions at issue in this case, however, and there is no challenge to the assertion that Gluck was not even aware of the mortgage on the Vacant Land arranged by Wagner, with Gluck as mortgagee, until shortly before a Gluck representative was deposed in this case. The district court was certainly justified in concluding that Gluck was not a knowing participant in the RICO conspiracy.

4. *BERKE*.

Stochastic contends that the New Jersey judgment in the Berke foreclosure action should have been binding on the district court as to Berke's liability, in accordance with the doctrine of collateral estoppel. This doctrine applies if "an issue tendered for resolution in a later litigation has been finally determined in a prior adjudication after a full and fair opportunity for litigation in which the issue was actually litigated and necessary to the prior decision." *Laaman v. United States*, 973 F.2d 107, 112 (2d Cir. 1992) (collecting cases), *cert. denied*, 1992 WL 347108 (Feb. 22, 1993) (No. 92-6592).

Stochastic's submissions to this court contradict its issue preclusion argument. In its reply brief (addressing the issue of claim preclusion), Stochastic states that "the factual predicate underlying this [RICO] action, and the evidence required to prove the claims in this action, are

entirely different from the discrete contract and fraud issues involved in. . . the Berke Foreclosure action."

In any event, all of the elements required to impose RICO liability upon Berke were not necessarily determined in the New Jersey foreclosure action. The district court expressly found that the RICO enterprise was operated with Berke "ha[ving] no understanding of how [he was] being used." Further, the New Jersey court's determination that Berke collaborated in an effort, violative of state law, to effectuate a fraudulent conveyance does not necessarily establish knowing participation in the commission of RICO predicate acts that establish a pattern of racketeering activity within the meaning of 18 U.S.C. § 1962(c) (1988), thus providing a basis for liability under § 1964(c). *See Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992) (collecting cases).

The issue might be closer with respect to the district court's determination that Berke was not liable on Stochastic's state law claims, but Stochastic contends on appeal only that Berke should have been held liable as a RICO conspirator. We perceive no reversible error in the district court's contrary determination.

C. *THE NEW JERSEY "ENTIRE CONTROVERSY" DOCTRINE.*

Counter-Appellants assert that Stochastic's RICO claim is barred by New Jersey's "entire controversy" doctrine. We are required by 28 U.S.C. § 1738 (1988) to accord the pertinent New Jersey proceedings (i.e., the *Insurance Case*, the *Guarantee Case*, and the *Foreclosure*

Case) "the same full faith and credit. . . as they have by law or usage in the courts of" New Jersey. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982) (federal courts must give state court judgments same preclusive effect they would have in issuing state); *see also* U.S. Const., Art. IV, § 1 (imposing similar obligation upon state courts).

The New Jersey entire controversy doctrine:

> is a preclusionary principle intended to prevent the fractionalization of litigation by requiring all claims between the same parties arising out of or relating to the same transactional circumstances to be joined in a single action. The effect of the doctrine is to preclude a party from withholding from the action for separate and later litigation a constituent component of the controversy even where that component is a separate and independently cognizable cause of action.

Brown v. Brown, 506 A.2d 29, 32 (N.J. Super. Ct. App. Div. 1986) (collecting cases); *see also Cogdell v. Hospital Ctr.*, 560 A.2d 1169, 1172-74 (N.J. 1989). The Third Circuit has noted that the New Jersey doctrine "reaches more broadly than the 'same cause of action' requirement of traditional res judicata doctrine." *Melikian v. Corradetti*, 791 F.2d 274, 279 (3d Cir. 1986); *see also Kozyra v. Allen*, 973 F.2d 1110, 1111 (3d Cir. 1992); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 112-13 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989). The doctrine precludes *all* claims arising out of the same controversy that *could have been* raised in the earlier

action, including those involving different legal theories or requesting alternative relief. *See Melikian*, 791 F.2d at 279; *see also* N.J. Ct. R. 4:27-1 cmt. 3 (Jan. 2, 1989).

The New Jersey Supreme Court has stated that:

> The purposes of the [entire controversy] doctrine include the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of "piecemeal decisions." 2 State of New Jersey Constitutional Convention of 1947, Committee on the Judiciary Report § II(J), at 1187 (1947). The entire controversy doctrine has evolved "to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness." *See Barres v. Holt, Rinehart and Winston, Inc.*, 74 N.J. 461, 465, 378 A.2d 1148 (1977) (Schreiber, J., dissenting).

Cogdell, 560 A.2d at 1173.

In this case, the district court concluded that the entire controversy doctrine did not bar the assertion of Stochastic's claims. No underlying rationale was articulated, but some colloquy indicates that the court relied upon the fact that Stochastic was asserting RICO claims in this action.

This does not appear to be an adequate basis to shield Stochastic from the application of the New Jersey doctrine. In *Printing Mart-Morristown, Inc. v. Rosenthal*, 650 F. Supp. 1444 (D.N.J.), *appeal dismissed mem.*, 833 F.2d 306 (3d Cir. 1987), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988), it was held, applying the entire controversy doctrine, that a subsequent federal RICO action was barred by a prior state court action arising from the same transaction, *see id.* at 1447-52, even though it had not then been definitively determined that state courts have concurrent jurisdiction over federal civil RICO actions.[5/] Given the unsettled state of the (since resolved) concurrent jurisdiction issue, the court ruled that the plaintiff was obliged to tender the RICO issue to the state court, rather than make a unilateral decision against concurrent jurisdiction and in favor of subsequent federal litigation. *See id.* at 1449-50.

In any event, as will appear, we find other grounds for nonapplication of the entire controversy doctrine in this case, and it is axiomatic that "we may affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S*, 943 F.2d 220, 223 (2d Cir. 1991) (collecting cases).

As indicated *supra*, the entire controversy doctrine requires "all claims between the same parties arising out of

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[5/] Such a definitive determination was subsequently made prior to the ruling of the district court in the instant case. *See Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990).

or relating to the same transactional circumstances to be joined in a single action." *Brown*, 506 A.2d at 32. The "transactional circumstances" of the instant case involve a fraudulent scheme to prevent the collection of the judgments in favor of Stochastic in the *Insurance Case* and the *Guarantee Case*. Most of this activity occurred after the entry of the judgment in the *Insurance Case*, so it cannot plausibly be claimed that the claims presented in the instant litigation should have been brought in the *Insurance Case*. The "transactional circumstances" of the *Guarantee Case* involved a simple claim that Anthony and Carol were liable, as guarantors, on amounts owing under a defaulted lease of school buses by Eagle from Stochastic. Even though the entire controversy doctrine requires the presentation of related claims arising after the inception of litigation to the court for its determination as to their inclusion in the pending litigation, *see Brown*, 506 A.2d at 34, it takes a considerable leap to conclude that the widely ramified scheme to thwart Stochastic's collection of any and all amounts owed to it by the DiDomenico interests should be regarded as having a close transactional relationship to the much simpler matter of the guarantees owed on the defaulted bus lease.

Furthermore, a contrary ruling would probably inure only to the benefit of Anthony and Carol, the only named defendants in the *Guarantee Case*, who may be practically judgment proof at this juncture as a result of the machinations that are the subject of the instant litigation. Mandatory joinder of parties was relatively limited in New Jersey practice prior to the *Cogdell* decision in 1989. *See Cogdell*, 560 A.2d at 1171-74. It was only established in *Cogdell* that "the entire controversy doctrine appropriately encompasses the mandatory joinder of parties," *id.* at 1178,

as well as claims, and this ruling was made applicable only prospectively as of July 24, 1989, *id.* at 1179, at which time judgments in favor of Stochastic had been entered in both the *Insurance Case* and the *Guarantee Case*.

We recall at this juncture our ruling *supra* that Stochastic may ultimately have a claim for lost debt against one or more of the defendants in this action, but any such claim has not yet accrued. Obviously, Stochastic cannot be faulted for its failure to assert a claim that still has not accrued in the prior New Jersey litigation. *See Printing Mart-Morristown*, 650 F. Supp. at 1449 (a prior judgment "'cannot be given the effect of extinguishing claims which did not . . . exist and which could not possibly have been sued upon in the previous case'") (quoting *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328 (1955).

Finally, as to the *Foreclosure Case*, Stochastic asserts without contradiction that it was not served as a defendant with the amended complaint in that case until after the initiation of the instant litigation. Thus, there can be no serious claim that the opportunity to assert counterclaims in the *Foreclosure Case* precluded the assertion of any claims by Stochastic herein.

For all the foregoing reasons, we affirm the ruling of the district court that the assertion of Stochastic's claims in this case was not barred by the New Jersey entire controversy doctrine.

D. *WAGNER'S LIABILITY FOR THE FRAUD COUNTS.*

Wagner contends that the district court incorrectly found him liable on Stochastic's fraudulent conveyance and common law fraud claims. Wagner concedes in his main appeal brief, however, that transfers were made "in reaction to a New Jersey judgment about to be entered, or [that] had been entered against James, DCJM and Carol Coaches; James was the legal owner of the assets in question and the intent was to disguise *his* continued ownership." Further, the district court explicitly found that Wagner masterminded these fraudulent transfers, used some of the transferred assets to pay his legal fees and personal expenses, and intended ultimately to cheat the DiDomenicos out of the Vacant Land for his personal benefit.

The New York Court of Appeals has made it clear that the pertinent provisions of the New York Debtor and Creditor Law provide a creditor's remedy for money damages against parties who participate in the fraudulent transfer of a debtor's property and are transferees of the assets and beneficiaries of the conveyance. *See FDIC v. Porco*, 75 N.Y.2d 840, 842, 552 N.E.2d 158, 159-60, 552 N.Y.S.2d 910, 911-12 (1990) (per curiam). It follows that Wagner was properly held liable on the fraudulent conveyance claim.

Wagner's liability for common law fraud is also amply sustained by this record. We note that the district court allowed this claim only as an alternative to the recovery on the fraudulent conveyance claim. Further, if

Stochastic recovers the judgment in the *Guarantee Case* independently in the New Jersey proceedings, the "one satisfaction" rule will preclude any recovery thereon as a component of the fraudulent conveyance claim, or the totality of the common law fraud claim, in this case. *See Phelan v. Local 305 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, 973 F.2d 1050, 1063 (2d Cir. 1992) ("A plaintiff may not recover twice for the same injury.") (collecting cases), *petition for cert. filed*, 61 U.S.L.W. 3511 (U.S. Jan. 4, 1993) (No. 92-1158).

CONCLUSION

The final judgment and supplemental final judgment of the district court are affirmed. Stochastic's motion to strike the second supplemental appendix is denied. Cross-Appellants' application to suppress Stochastic's reply brief is denied. The parties shall bear their own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of August one thousand nine hundred and ninety-three.

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STOCHASTIC DECISIONS, INC.,
Plaintiff-Appelant,
Cross-Appellee,

-v.-

JAMES DIDOMENICO; ANTHONY DIDOMENICO; CAROL DIDOMENICO; DCJM REALTY CORP; CAROL COACHES, INC.; J.D. ENTERPRISES, INC.; SOUTHGATE BUS SERVICE; ARTHUR WAGNER; LUCILLE WAGNER; WAGNER, MCNIFF & DIMAIO; T. GLUCK & CO., INC.; and MICHAEL BERKE,
Defendants-Appellees,
Cross-Appellants,

KINGSBURY-PUTNEY, INC.; GEOFFREY ASHBY; THOMAS MIRAL,
Defendants.
DOCKET NUMBERS:
92-7303, 92-7321, 92-7383

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, cross appelle Stochastic Decisions, Inc.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX C
[Dated October 9, 1991]

MR. TESSLER: If I may, your Honor, with your Honor's permission indulge in my summation. I forgot one point. I know Ms. Chaitman has asked the RICO count can encompass, satisfy judgment.

THE COURT: I'm not going to grant that.

MR. TESSLER: Thank you.

THE COURT: The following constitute the Court's findings of fact and law. I expect the plaintiff within 10 days to submit detailed findings of fact and law and the defendants will then have 10 days to object, suggest modifications. I think that's probably the best way to proceed, rather than have the defendants waste their time with a lot of findings that I'm not going to make in light of what I'm going to say.

The Plaintiff, which I shall refer to as the insurance broker, is suing Anthony and Carol DiDomenico, who I will refer to collectively as the elder DiDomenicos. Their son, James, various bus operating corporations used by the DiDomenicos, all three of them, their lawyer, Arthur Wagner, his wife, a group called Wagner, McNiff and DiMaio who are alleged to be a law firm and various other parties whose cases have been dismissed.

I should add parenthetically I find Mr. DiMaio individually is not responsible for anything. I find that this was not a bona fide partnership with a partnership agreement. It was essentially Mr. Wagner using what

appeared, purported to be, a partnership but which was not a partnership.

I'm dismissing and have dismissed against individuals that I've mentioned already without costs and disbursements. They're not getting costs and disbursements against the plaintiff.

Is that clear?

There's alleged a RICO conspiracy under federal law as well as a claim for fraudulent conveyances of real property under state law and a claim for common law fraud under state law. All three claims have been proven by a preponderance.

In the early 1980s the elder DiDomenicos were in good shape financially.

Anthony came from a family of bus operators, having entered into the business in his early teens. He was highly capable as a businessman. The elder DiDomenicos were millionaires. They owned a flourishing bus business, their own home, had substantial cash assets.

They contracted with the City of New York to purchase a large parcel of vacant land in Staten Island at a favorable price with a relatively small purchase money mortgage from the City which still has not been satisfied. I'll refer to this parcel or what remains of it, about 15 acres as I understand it now, as the vacant land.

At about the time they purchased the vacant land, Anthony suffered a series of medical setbacks. He required

heart operations and treatment for his cancer. Believing that he would not be able to continue in control, Anthony and his wife transferred the legal title to most of their property, not their residence, of course, to their son, James, who was in his early twenties.

The elder DiDomenicos arranged with their son that they would retain beneficial ownership. The son agreed to handle the property for the benefit of his parents, leaving them, in effect, with equitable title to the vacant land and much of the bus operations. The son, however, gradually expanded his own role. Some bus operations were owned and operated by him, but it doesn't make any difference what the details of that relationship were for the purposes of this case.

Deregulation of the bus industry under the President's administration by the ICC and the poor physical health and loss of confidence in their capacity by the elder DiDomenicos as well, in part, perhaps, as the lack of experience of the son, led to a sharp deterioration in the profitability of the family's bus operations. Nevertheless, in order to operate they needed insurance, and premiums were high.

The insurance broker was paid premiums by the DiDomenico bus operations. The broker earned very substantial commissions on these premiums. More premiums and more insurance, however, was needed. There was no money to pay for insurance. There was no ready cash.

The elder DiDomenicos paid and guaranteed payment of advances for premiums by the broker by

mortgaging their home, selling much of their assets, and personal guarantees as payment. The broker advanced premiums, and the money he was owned by the DiDomenicos increased rapidly. Ultimately, most of the assets of the bus operations were sold and the main operating company of the elder DiDomenicos, Eagle, went into Chapter XI bankruptcy.

In a nasty series of litigations in New Jersey state courts, two large judgments were obtained by the broker; one, against the son or what appeared to be the son's corporations, was paid largely by a lien on proceeds from a lucrative bus contract with the Board of Education of the City of New York. The other, against the elder DiDomenicos, is the main predicate for the present suit.

When in the mid-1980s properties were being sold and bankruptcy proceedings had been started, the DiDomenicos turned to Arthur Wagner, an experienced lawyer specializing in bus matters. I'm going to refer to him as the lawyer. The lawyer arranged with the elder DiDomenicos to take control of essentially all of their assets and much of what were, on their face at least, the son's assets.

The understanding the lawyer had with the three DiDomenicos was that he would preserve as much as he could for them. He used those assets to pay some of the debts, obtaining releases for substantially less than the full value of most creditors' claims. He was very skillful at doing this. Some of the assets were used to pay personal expenses of the elder DiDomenicos. Much of the assets were retained by the lawyer as his fee and for his own personal family expenses.

These assets, if they had been made available to creditors, would have paid all of the debts of all of the DiDomenicos and their companies. There were more than sufficient assets to pay the debts due to the broker when those debts were due.

The broker was one creditor who demanded full payment and would not compromise. Angered by this intransigence and, perhaps, thinking that he was assisting his client and himself, and preventing fees that he expected to retain from the DiDomenico assets being expended, the lawyer decided to block the broker from collecting any of his debts or judgments that the broker might obtain against the elder DiDomenicos or James.

To do this he used dummy corporations, dummy sales and mortgages, trust and special accounts of his own law practice, nominees who had no understanding of how they were being used, including the son-in-law, and some of his country club friends and clients.

None of the persons the lawyer used in these frauds except the elder DiDomenicos, their son and the bus companies and those companies that they controlled were aware of the lawyer's fraudulent scheme. The lawyer, the elder DiDomenicos and his son and all of the DiDomenico companies named as defendants entered into a conspiracy to hide assets and defraud the broker and other creditors.

The vehicle they used was essentially the DiDomenico companies as alleged in the complaint. These systematic frauds of the lawyer and co-conspirators was used, in addition to other illegal objects of the conspiracy to prevent the broker from satisfying judgments against the

elder DiDomenicos that the broker had obtained or would obtain in a New Jersey Court.

Particular attention was devoted by the co-conspirators to protecting the vacant land so that the lawyer could ultimately profit from its sale. The lawyer had a personal interest, apart from that of his client, in hiding the true ownership of this vacant land. It was all part of the same conspiracy however.

That land if sold could easily have paid any judgment of the broker against the elder DiDomenicos. There's no doubt that the elder DiDomenicos retained equitable title to the vacant land. After the formal transfer to their son of legal title in 1982, they repeatedly acknowledged ownership on applications for credit and even in an affidavit. The lawyer was fully cognizant of the real ownership and of the fraud being created.

The lawyer created a series of frauds to block collection of the judgment -- and when I say judgment I mean only the second judgment, the one against the DiDomenicos. He, in effect, admitted on the witness stand that there was a scheme which he was a party to, to block collection of the broker's judgment against the elder DiDomenicos.

Ultimately the frauds included cheating the elder DiDomenicos out of their last substantial asset, the vacant land, but this was, again, part of a whole conspiracy and does not take the elder DiDomenicos out of the conspiracy under RICO. It's not unusual when you have criminal conduct for one conspirator to turn against another in the final stages.

This vacant land fraud included a subscheme to encumber the land with two mortgages and ultimately to sell the land to a bona fide purchaser for value subject to mortgages which themselves were fraudulently created and were a part of the total conspiracy.

I find the present mortgages are valid against the purchase for value whose purchase price was reduced by their amount. There's no reason why he should receive a windfall.

The mortgages placed on a property are not valid against the broker. The broker is owed the full judgment against the elder DiDomenicos plus interest to date. He is entitled to a first lien against this vacant land subordinate only to the City's mortgage in the amount of the judgment obtained in New Jersey plus interest plus legal fees plus the amount of the judgment to be entered in this RICO claim.

The attorney's fees imposed under the fraudulent transfer claim reduce the amount of the attorney's fees expended in the current RICO claim. They're attributable to the fraudulent conveyance action as a reasonable proportion of the total fees expended in the present action. Since they are either earned in the RICO count or in the fraudulent conveyance count, nothing turns on the issue of which of the two causes of action they are attributable to.

However, in case of reversal on one count, but not the other, the allocation may become important, and it is for that reason that I'm breaking it down. I'm not allocating any attorney's fees under the common law fraud because I don't think plaintiff is entitled to attorney's fees under common law fraud.

The mortgages, except the City's, are subordinate to the amount of the broker's lien which would be the amount of the total of the judgments under RICO and under the fraudulent conveyance count.

The attorney's fees earned in the fraudulent conveyance action I allocate as $100,000. I think that's what reasonable attorney's fees would be if that was the only cause of action.

Since there were no crossclaims by the defendants, the Court makes no finding as to the priorities or validity of the mortgages other than the City's as between the nominal owners of those mortgages or holders of those mortgages and the other parties.

The Court, as I've indicated, will lend its services, if the parties wish, in resolving the very difficult issues of who owns what after the lien of plaintiff in order to avoid the necessity for further very expensive litigation which could quickly eat up whatever the value of that land is after the City and the plaintiff and the bona fide purchaser have taken their share.

Much of the legal fees of the broker expended to collect its judgment against the elder DiDomenicos were due to the lawyer's fraud. Some of the broker's legal fees would have been expended even without the fraud in the normal supplementary and other proceedings attendant on collection of a debt when, as in this case, a business entity fails and the guarantors of the debt find themselves financially destroyed.

The plaintiff is entitled to none of his legal fees expended in obtaining the New Jersey judgments, nor is he entitled to the New Jersey judgment as part of the RICO damages. The fees earned in obtaining the New Jersey judgments have been eliminated from the damages and fees allowed in the instant action.

Based on the extensive record before the Court of the New Jersey and present litigations and ancillary proceedings and negotiations, the value of legal fees earned by counsel from the broker, which would not have been needed were it not for the conspiracy under RICO and were it not for the wire and mail fraud predicate acts under RICO, is $50,000.

The $50,000 damages is computed as follows: There is billed to the broker for this phase of legal services by his counsel $71,976.26 -- and properly billed.

Of that amount there was billed in the proceedings relating to the punitive damage remission application and appeal in New Jersey $600.

There was billed for the appeal from the state fees of the receiver $3,000.

There was billed in the dispute with the counsel for Cassella, $1,500. The 600, the 3,000 and 1,500 are not properly allocable as damages in the RICO action.

I also find that some of the fees earned in connection with the extra litigation and other proceedings required as a result of the RICO conspiracy are excessive. I find the amount of excessive fees is $16,876.26. So,

deduct a total of $21,976.26 from 71,976.26 leaving net damages of $50,000 in the RICO action.

This is an entirely reasonable sum, reasonably expended and paid for. These are the damages attributable and foreseeable from the conspirators, result directly from the RICO violations. They are trebled, and trebling results in an element of damages of $150,000.

Fees chargeable as earned in this combined RICO fraud and creditors' fraud action common law fraud to August 31st total $383,757. These fees must be added to billings for September and October to date amounting to $98,434.04. Thus, the total legal fee cost of prosecuting this RICO action plus the fraudulent transfer action is $482,191.04.

From this must be subtracted $80,000, which is the fees earned from unreasonably excessive litigation leaving fees assessable in the two causes of action of $402,191.04. This is an entirely reasonable sum given the difficulty of this kind of litigation. As I've said, $100,000 of this is allocated to the fraudulent conveyance portion, leaving $302,191.04 as the fees attributable to the RICO cause of action.

The RICO judgment is for $150,000 plus $302,191.04 of fees.

All of the checks referred to in the course of these proceedings were mailed. There may have been one or two exceptions. If so, they should be eliminated. Each mailing constituted a violation of law since mailings were in support of, and part of the illegal conspiracy. The

plaintiff will list the amounts and dates in the findings of facts since each is a separate predicate act under RICO.

The same is true of each telephone call proved. They will be listed separately and with the date as closely as it can be determined.

Each wiring of funds is a wire fraud, I believe, although this may not be the case. Such wires also will be listed separately as predicates. There are scores of predicate acts, more than enough under the statute.

I'm not going to read the details, but in the appendix to the trial memorandum of law of plaintiff there's an appendix. Its' a listing of the actions of James DiDomenico, Anthony and Carol DiDomenico, DJM Realty Corp., Carol Coaches, Inc., JD Enterprises, South Gate Bus, and Arthur Wagner acting in his own name and acting in the name of Wagner, McNiff and DiMaio. I find that all of those elements in those appendices have been proven. They will be listed in the findings of fact as well.

Since there was a single conspiracy to which all the defendants not dismissed were a party, the judgment is joint and several. The plaintiff has already expressed a desire to place a lien for the entire judgment entered here -- both the legal fees in the fraudulent transfer, the judgment, the interest on the judgment, the treble damages in the RICO action -- the legal fees in the RICO action as a lien against the land. That may be done.

Even though the judgment will be entered against all the defendants jointly and severally, that lien, as I understand it, although I'm not necessarily making a

finding at this point, can be entered against the vacant land. Collection can be tried against the others, and if it doesn't work, or to the extent it does work, it's deducted from the lien since there can't be double recovery.

All of the defendants are enjoined from transferring or encumbering any of their property pending entry of the final judgment in this case plus five days. Mrs. Wagner is enjoined, likewise, from transferring any of her property for that same period since it may well be that she is holding those assets as a nominee for her husband.

We can assume a stay pending appeal would require a full bond.

Any other findings of fact and law or objections people wish to take at this time?

APPENDIX D*/

[Dated November 18, 1991]

[Exhibits Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STOCHASTIC DECISIONS, INC.,

Plaintiff,

-against-

JAMES DIDOMENICO, ANTHONY DIDOMENICO, CAROL DIDOMENICO, DCJM REALTY CORP., CAROL COACHES, INC., J.D. ENTERPRISES, INC., SOUTHGATE BUS SERVICE, ARTHUR WAGNER, WAGNER, LUCILLE WAGNER, MCNIFF & DIMAIO, GEOFFREY ASHBY, THOMAS MIRAL, KINGSBURY-PUTNEY, INC., T. GLUCK & CO., INC., and MICHAEL BERKE,

Defendants.

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89 Civ. 0361

Final Judgment and Order

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*/ The District Court modified the proposed Findings of Fact and Conclusions of Law submitted by Petitioner. In this appendix "-----" represents material stricken by the District Court and "_____" represents material added by the District Court.

This matter was tried before the court from September 23 to October 8, 1991. The court rendered its decision on October 9, 1991, which included findings of fact and law. The pleadings were deemed amended to conform to the proofs, which support the judgment. Final judgment is entered in favor of plaintiff Stochastic and against defendants James DiDomenico, Anthony DiDomenico, Carol DiDomenico, DCJM Realty Corp., Carol Coaches, Inc., J. D. Enterprises, Inc., Southgate Bus Service, Arthur Wagner, Wagner, McNiff & DiMaio, and Kingsbury-Putney, Inc. jointly and severally, as follows:

(1) On the first cause of action for violations of the Racketeer Influenced and Corrupt Organizations Act: $467,477.24.

(2) On the second cause of action for violations of New York State fraudulent conveyance law: $689,930.70.

(3) On the third cause of action for common law fraud: $589,930.70.

(4) The first and second causes of action are independent of one another; plaintiff is awarded judgment on both, that recovery totalling $1,157,407.94.

(5) The second and third causes of action are exclusive of one another. Recovery on the second cause of action precludes recovery on the third. If judgment on the second cause of action is reversed, plaintiff may recover on the third cause of action.

(6) Plaintiff's judgment in the amount of $1,157,407.94 shall be secured by a mortgage on the real property situate in Richmond County, New York at Block 7328, Lot 100 on the Richmond County Tax Map. This mortgage will be subordinate only to the mortgage of the City of New York. The mortgage shall be recorded against the property.

(7) The existing mortgages of Kingsbury-Putney, Inc. in the respective amounts of $650,000 and $1,635,000 shall be deemed restructured so that plaintiff Stochastic shall have all of the rights of Kingsbury-Putney, Inc. with respect to those mortgages until the judgment with interest to date of payment is satisfied. The Kingsbury-Putney, Inc. mortgages are reduced by the amount of $1,157,407.94, the prior lien now granted to plaintiff. This reduction is required so that the present owner's equity is not reduced.

(8) Kingsbury-Putney, Inc. is enjoined from taking any further action in the foreclosure action entitled Kingsbury-Putney, Inc. v. Stephen Pearlman, As Exchange Trustee for Ghazi Bokhari and Ghazi Bokhari et al., Index No. 1039/91, pending in the Supreme Court of New York, Richmond County until plaintiff's judgment is satisfied. Plaintiff is authorized to continue the foreclosure action and to exercise all of Kingsbury-Putney, Inc.'s rights under the mortgages until plaintiff's judgment with interest to date of payment is paid in full.

(9) Costs and disbursements are not granted. They are not justified in light of the substantial fees and

disbursements already encompassed by the judgments.

So ordered.

Brooklyn, New York
November 18, 1991

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STOCHASTIC DECISIONS, INC.,	:	
Plaintiff,	:	Civil Action No.
-against-	:	89-0361 (JBW)
JAMES DIDOMENICO, ANTHONY DIDOMENICO, CAROL DIDOMENICO, DCJM REALTY CORP., CAROL COACHES, INC., J.D. ENTERPRISES, INC., SOUTHGATE BUS SERVICE, ARTHUR WAGNER, LUCILLE WAGNER, WAGNER, MCNIFF & DIMAIO, GEOFFREY ASHBY, THOMAS MIRAL, KINGSBURY-PUTNEY, INC., T. GLUCK & CO., INC., and MICHAEL BERKE,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendants.	:	**[Signed by consent as modified consistent with findings at end of trial]**

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This matter having been tried before the Court from September 23 through October 8, 1991; and the Court having rendered its decision on October 9, 1991; the Court makes the following findings of fact and conclusions of law and orders that judgment be entered in accordance herewith.

FINDINGS OF FACT

1. Stochastic Decisions, Inc. ("Stochastic") is a New Jersey corporation engaged in providing insurance brokerage services.

2. James DiDomenico is the son of Anthony and Carol DiDomenico (together, the "DiDomenicos"). The DiDomenicos have been engaged in the interstate bus transportation business through various New York and New Jersey corporations including:

a. DCJM Realty Corp. ("DCJM"), the former owner of 15 acres of vacant land in Staten Island, New York (the "Vacant Land");

b. Carol Coaches, Inc. ("Carol Coaches"), the former owner of a garage at 1893 Richmond Terrace, Staten Island, New York (the "Garage");

c. J.D. Enterprises, Inc. ("JD"), the owner of certain buses leased to the operating companies;

d. Eagle Bus, Inc. ("Eagle"), the former operating bus company of the DiDomenicos which filed in chapter 11 on October 11, 1985. ~~Eagle Creditor's~~ Plaintiff received no payments on ~~their~~ its claims out of the bankruptcy.

e. Southgate Bus Service, Inc. ("Southgate"), the DiDomenicos current operating bus company. Together, these corporations are referred to as the "DiDomenico Enterprise."

3. Arthur Wagner is a New York attorney and ~~a partner of~~ operating under the name Wagner, McNiff & DiMaio. Wagner and Wagner, McNiff & DiMaio acted as counsel to the DiDomenicos and the DiDomenico Enterprise since October 1984. The DiDomenicos originally retained Wagner to defend them in certain suits brought by creditors of Eagle pursuant to the DiDomenicos' guaranty of Eagle obligations.

4. Lucille Wagner is Arthur Wagner's wife. She was an employee of Wagner, McNiff & DiMaio in 1986 and 1987.

5. Geoffrey Ashby, Thomas Miral and T. Gluck & Co. are clients of Wagner, McNiff & DiMaio.

6. Kingsbury-Putney, Inc. ("KPI"), is a New York corporation formed by Wagner and Wagner, McNiff & DiMaio to hold the Vacant Land.

7. Michael Berke is Wagner's son-in-law.

8. Ghazi Bokhari is the present owner of the Vacant Land which is subject to two purchase money mortgages, one in the amount of $650,000 and the other in the amount of $1,635,000 (the "Bokhari Mortgages").

9. Stochastic obtained two judgments against the DiDomenicos and their companies as follows:

a. On June 13, 1988, Stochastic obtained a judgment against DCJM, Carol Coaches and ACJ Transportation Corp. in the amount of $222,148.92 and against James DiDomenico in the amount of $152,214.42

including $100,000 in punitive damages (the "First Judgment"). The First Judgment was affirmed by the New Jersey Appellate Division and the defendants' petition for certification to the New Jersey Supreme Court was denied. This judgment has been paid in full.

b. On April 10, 1989, Stochastic obtained a judgment against Anthony and Carol DiDomenico, as guarantors of the obligations of Eagle, in the amount of $474,150.38 plus attorneys' fees of $19,338.38 for a total judgment of $493,488.76 (the "Second Judgment"). The DiDomenicos did not appeal the Second Judgment. This judgment has not been paid.

10. Stochastic had not obtained payment on either the First Judgment or the debt supporting the Second Judgment as of January 31, 1989 when the complaint in this action was filed. Stochastic obtained full payment on the First Judgment on December 17, 1989 as a result of its levy on a contract between the New York City Board of Education and James DiDomenico. Stochastic has never received any payment on the Second Judgment.

11. The complaint alleges that the defendants engaged in a conspiracy involving bankruptcy fraud, wire fraud and mail fraud to prevent Stochastic from collecting the amounts owed to it. The first claim is under RICO; the second claim seeks to avoid certain transfers under the New York fraudulent conveyance laws; and the third claim seeks damages for fraud.

12. Plaintiff consents to the dismissal of the complaint against Geoffrey Ashby and Thomas Miral. The Court dismisses the complaint against Michael Berke, T.

Gluck & Co., Inc. and Lucille Wagner, except that Lucille Wagner and the remaining defendants are enjoined, for five days following the entry of judgment, from transferring any assets. All dismissals are without costs and disbursements against the plaintiff.

13. ~~With respect to the remaining defendants: Anthony, Carol and James DiDomenico; Wagner and Wagner, McNiff & DiMaio; DCJM; Carol Coaches; JD; Southgate; and KPI (hereafter, the "defendants"); the Court incorporates the facts set forth in the appendix to Stochastic's trial brief, the relevant portions of which are annexed hereto as Exhibit A. (10/9/91 Transcript at 79).~~ The claims in appendix A attached are not required to support the judgment though they are neither adopted nor rejected by the court.

14. Following the bankruptcy of Eagle, Anthony and Carol DiDomenico arranged for Wagner and Wagner, McNiff & DiMaio to take control of essentially all of their assets and much of what were, on their face at least, James' assets. ~~(10/9/91 Transcript at 72).~~

15. Wagner's understanding with the DiDomenicos was that he would preserve as much as he could of the assets for them. He used those assets to pay some of their debts, obtaining releases for substantially less than the full value of most creditors' claims. He was very skillful at doing this. Some of the assets were used to pay personal expenses of Anthony and Carol DiDomenico and business expenses of James. Much of the assets were retained by Wagner and Wagner, McNiff & DiMaio as a fee and for Wagner's personal family expenses.

16. These assets, if they had been made available to creditors, would have paid all of the debts of all of the DiDomenicos and their companies. There were more than sufficient assets to pay the debts due to Stochastic in a timely manner. ~~(10/9/91 Transcript at 72).~~

17. Stochastic refused to settle on terms proposed by the DiDomenicos. In an effort to preserve the assets for the DiDomenicos and for himself, Wagner and Wagner, McNiff & DiMaio decided to block Stochastic's efforts to collect on its judgment. ~~(10/9/91 Transcript at 72).~~

18. In carrying out this plan, Wagner and Wagner, McNiff & DiMaio used dummy corporations, dummy sales and mortgages, trust and special accounts of his own law firm, and nominees who had no understanding of how they were being used, including his son-in-law, some of his country club friends, and clients. ~~(10/9/91 Transcript at 72-73).~~

19. The defendants entered into a ~~massive~~ conspiracy to prevent Stochastic from recovering the amounts that were owed to it. ~~(10/9/91 Transcript at 73).~~ The conspiracy continued over a period of five years which included the commission of scores of wire frauds and scores of mail frauds. A separate predicate act occurred every time a check was mailed or wire was used or the telephone was used. Annexed ~~hereto~~ as Exhibit B is a list of each instance of mail fraud by the defendants. Annexed ~~hereto~~ as Exhibit C is a list of each instance of wire fraud by the defendants. ~~(10/9/91 Transcript at 45, 78-79).~~

20. Particular attention was devoted by the co-conspirators to protecting the Vacant Land so that Wagner

and Wagner, McNiff & DiMaio could ultimately profit from its sale. Wagner had a personal interest, apart from his client, in hiding the true ownership of the Vacant Land. ~~It was~~ as all part of the same conspiracy. ~~(10/9/91 Transcript at 73).~~

21. ~~There is no doubt that~~ Anthony and Carol DiDomenico retained equitable title to the Vacant Land. After the formal transfer to James in 1982 they repeatedly acknowledged ownership on applications for credit and even in an affidavit. Wagner was fully cognizant of the real ownership and of the fraud that was being created. ~~(10/9/91 Transcript at 73-74).~~

22. Wagner and Wagner, McNiff & DiMaio created a series of frauds to block Stochastic from satisfying its judgment out of the Vacant Land. The scheme included a subscheme to encumber the land with two mortgages and ultimately to sell the land to a bona fide purchaser for value subject to mortgages which themselves were fraudulently created and were part of the total conspiracy. ~~(10/9/91 Transcript at 74).~~ Ultimately, the frauds included cheating the elder DiDomenicos out of their last substantial asset. This was part of a whole conspiracy and does not take the elder DiDomenicos out of the conspiracy under RICO. It is not unusual when you have criminal conduct for one conspirator to turn against another in the final stages. (10/9/91 Transcript at 74).

23. Plaintiff's counsel was a credible witness~~(10/9/91 Transcript at 38; 56)~~. There was nothing unreasonable, vindictive or suspicious about plaintiff's counsel's refusal to reach a settlement with the court-appointed receiver on the terms proposed. ~~If there was any~~

~~paranoia on plaintiff's part it was amply justified by the facts. (10/9/91 Transcript at 56-57; 64).~~

24. Anthony DiDomenico was not credible. ~~(10/9/91 Transcript at 42; 46).~~ The DiDomenicos were not innocent dupes but were knowing participants in the RICO violations. ~~(10/9/91 Transcript at 57-58).~~

25. The DiDomenicos never offered in good faith to pay the Second Judgment. ~~(10/9/91 Transcript at 43).~~

26. The sale to Ghazi Bokhari was a bona fide sale.

27. Thomas DiMaio individually was not responsible for any of the predicate acts. Wagner, McNiff & DiMaio was not a bona fide partnership although it held itself out to the public as a general partnership.

28. Stochastic is entitled to $50,000.00 in legal fees incurred as a result of the RICO conspiracy. ~~(10/9/91 Transcript at 77).~~ Stochastic's damages under RICO are this sum trebled, or $150,000.00.

29. Stochastic's legal fees in prosecuting the RICO action through August 31, 1991 were $383,757.00. ~~(10/9/91 Transcript at 78).~~

30. Stochastic's legal fees for September 1991 totalling $67,197.04 and legal fees from October 1, 1991 through October 8, 1991 of $30,237.00 are reasonable. ~~(10/1/91 Transcript at 10).~~ Stochastic's total legal fees through October 8, 1991 were $481,191.04.

31. Stochastic's disbursements for September and October 1991 totalling $16,286.20 are reasonable. This sum includes $6,823.45 for photocopying for trial exhibits; $120.00 for velobinding trial exhibits; $200.00 for taxis; $656.75 for overtime secretarial and xeroxing staff; and $8,486.00 for court transcripts.

32. Stochastic's total legal fees and expenses in prosecuting the RICO action through October 8, 1991 are $497,477.24. The Court finds that of this amount, $80,000.00 was the result of unreasonably excessive litigation, leaving assessable fees of $417,477.24. Of this amount, $100,000.00 is chargeable to the fraudulent conveyance action; $317,477.24 is chargeable to the RICO action. Thus, the RICO judgment is for $150,000 plus $317,477.24 or $467,477.24.

CONCLUSIONS OF LAW

1. Stochastic has proven all three of its claims by a preponderance of the evidence. ~~(10/9/91 Transcript at 69).~~

2. The defendants engaged in a ~~massive~~ conspiracy in violation of 18 U.S.C. sections 1962(c) and (d) which included scores of wire frauds and scores of mail frauds. Every time a check was mailed or wire was used or the telephone was used, a separate predicate act occurred.

3. Stochastic has standing under RICO because it suffered injury through the non-payment of the amounts owed to it and through defendants' frustration of Stochastic's attempts to obtain payment.

4. Stochastic's claims are not barred by equitable estoppel; judicial estoppel; collateral estoppel; res judicata or the entire controversy doctrine.

5. The Bokhari Mortgages are ~~valid against Bokhari but are~~ not valid against Stochastic.

6. The transfer by Anthony, Carol and James DiDomenico and Carol Coaches of the proceeds of the Garage to Wagner and Wagner, McNiff & DiMaio was a fraudulent conveyance.

7. The transfer by Anthony and Carol DiDomenico and ACJ to James of the New York City Board of Education contract was a fraudulent conveyance.

8. The transfers by Anthony and Carol DiDomenico, James DiDomenico, and DCJM of the Vacant Land were fraudulent conveyances.

9. The transfers of the assets of Eagle to Carol Coaches and then to Southgate were fraudulent conveyances.

10. The transfers of the proceeds of the Garage out of the Wagner, McNiff & DiMaio account were fraudulent conveyances.

11. The transfers of funds out of the accounts of Eagle, Carol Coaches and Southgate for the personal living expenses of the DiDomenicos were fraudulent conveyances.

12. The transfers of the Vacant Land from Anthony and Carol DiDomenico to DCJM and then to Kingsbury-Putney were fraudulent conveyances.

13. The assignment of the Gateway State Bank mortgage to Berke, the mortgage granted to T. Gluck & Co., and the assignment of mortgage granted to Howard Ginsberg were fraudulent conveyances.

14. Stochastic was damaged by the aforementioned fraudulent conveyances in the amount of the Second Judgment of $589,930.70 plus $100,000.00 in legal fees.

15. All of the defendants participated in the aforementioned fraudulent conveyances.

16. Judgment shall be entered against all of the defendants, jointly and severally, in the amount of $689,930.70 on the fraudulent conveyance claim.

17. All of the defendants participated in the RICO violations.

18. All of the defendants committed numerous predicate acts in violation of RICO.

19. The attorneys' fees imposed under the fraudulent conveyance claim, fixed by the Court at $100,000.00, reduce the amount of the attorneys' fees allowed in the RICO claim. No attorneys' fees are being awarded under the common law fraud claim because none are permissible.

20. Stochastic is not entitled to ~~attorneys~~ attorneys' fees incurred in obtaining the two New Jersey judgments.

21. Stochastic is not entitled to have the New Jersey judgments trebled as part of the RICO damages.

22. Stochastic is entitled to judgment under RICO against all of the defendants, jointly and severally, in the amount of $467,477.24.

23. Stochastic is entitled to a mortgage against the Vacant Land for the amount of $1,157,407.94, subordinate only to the first mortgage of the City of New York in the approximate amount of $150,000.00. ~~(10/9/91 T. nscript at 75).~~ The mortgage includes the amount due under the Second Judgment, with interest; plus legal fees; plus the amount of the RICO judgment.

24. The Stochastic mortgage shall be a second mortgage on the Vacant Land, subject only to the mortgage of the City of New York in the approximate amount of $150,000.00.

25. The existing mortgages of Kingsbury-Putney, Inc. in the respective amounts of $650,000.00 and $1,635,000.00 shall be restructured so that Stochastic shall have all of the rights of Kingsbury-Putney, Inc. under those mortgages until the judgment with interest is satisfied in full. ~~Stochastic shall be entitled to add to the amount of its mortgage the costs of obtaining title insurance on the restructured mortgages and other related costs.~~

26. Ghazi Bokhari, as a defendant with respect to the fraudulent conveyance claim, is bound by this judgment.

27. Stochastic is entitled to judgment on its third claim for fraud in the amount of $589,930.70~~. In the event the RICO judgment is reversed, Stochastic shall be entitled to a judgment for its damages under the fraud claim.~~ should this fraudulent conveyance judgment be reversed.

Dated: ~~October~~ November 18, 1991

/s/ Jack B. Weinstein
Jack B. Weinstein, Judge
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STOCHASTIC DECISIONS, INC.,	:	
Plaintiff,	:	
-against-	:	89 Civ. 0361
JAMES DIDOMENICO, ANTHONY DIDOMENICO, CAROL DIDOMENICO, DCJM REALTY CORP., CAROL COACHES, INC., J.D. ENTERPRISES, INC., SOUTHGATE BUS SERVICE, ARTHUR WAGNER, WAGNER, LUCILLE WAGNER, MCNIFF & DIMAIO, GEOFFREY ASHBY, THOMAS MIRAL, KINGSBURY-PUTNEY, INC., T. GLUCK & CO., INC., and MICHAEL BERKE,	:	Supplemental Final Judgment
Defendants.	:	

This matter having been tried before the Court from September 23 to October 8, 1991; and the Court having entered final judgment on November 18, 1991; and the final judgment having inadvertently failed to dispose of certain issues, a supplemental final judgment is hereby entered as follows:

1. The complaint is dismissed with prejudice and without costs against Lucille Wagner, Geoffrey Ashby,

Thomas Miral, T. Gluck & Co., Inc., Michael Berke and XYZ Corporation.

2. The counterclaim of Kingsbury-Putney, Inc. is dismissed with prejudice and without costs.

Dated: February 25, 1992

/s/ Jack B. Weinstein
Jack B. Weinstein, U.S.D.J.

APPENDIX F

18 U.S.C. §1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate

transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the

United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. §1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at anytime enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fees.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.